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Spiess v. C. Itoh & Co. (America): Do U.S. Commercial Treaties Provide Foreign Corporations with an Immunity from U.S. Civil Rights Laws?

The recent federal district court ruling in *Spiess v. C. Itoh & Co. (America), Inc.*[1] raised novel questions about the application of U.S. civil rights laws to foreign-owned companies operating in the United States. The *Spiess* court considered the assertion by a Japanese-owned subsidiary that the Treaty of Friendship, Commerce and Navigation between the United States and Japan[2] provided Japanese companies operating in the United States with the absolute right to hire employees "of their choice,"[3] irrespective of U.S. antidiscrimination laws.[4] Upon examining the Treaty, the U.S. District Court for the Southern District of Texas denied the subsidiary's motion to dismiss, finding that any immunity which might exist did not extend to a foreign subsidiary incorporated under the laws of the United States.[5] Shortly after the ruling in *Spiess*, federal district courts in *Avigliano v. Sumitomo Shoji America, Inc.*[6] and *Linskey v. Heidelberg Eastern, Inc.*[7] decided substantially the same question. Together with opinions expressed by the Department of State, the Equal Employment Opportunity Commission, and the Treaty negotiators,[8] these decisions present myriad interpretations of the same treaty provisions.[9]

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[1] 469 F. Supp. 1 (S.D. Tex. 1979).

[2] Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Treaty].

[3] "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents, and other specialists of their choice . . . ." *Id.*, art. VIII, para. 1.

[4] 469 F. Supp. at 2.

[5] *Id.* The court was ruling on defendant's motion to dismiss. The decision was certified for immediate appeal.

[6] 473 F. Supp. 506 (S.D.N.Y. 1979), *aff'd on rehearing*, 21 Fair Empl. Prac. Cas. 580 (S.D.N.Y. 1979).

[7] 470 F. Supp. 1181 (E.D.N.Y. 1979).

[8] *See* text accompanying notes 45-65 *infra*.

[9] The Japanese Treaty is one of more than 25 commercial treaties involving the United States, containing the exact or substantially similar provisions. Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. at 1185. While the treaties are often labelled "commercial," the subject matter extends to certain commitments in international law, such as national treatment and most favored nation treatment. Wilson, *Post War Commercial Treaties of the United States*, 43 AM. J. INT'L. L. 262, 264 (1947). Although the "right to choice" provisions in these treaties are not identical, they vary only in the specific employee positions which they name. Because there is

Plaintiffs in *Spiess* alleged that their employer, Itoh-America, engaged in racially discriminatory employment practices[10] in violation of Title VII of the 1964 Civil Rights Act[11] and 42 U.S.C. section 1981.[12] For its defense,[13] Itoh-America relied on article VIII(1) of the 1953 Treaty, which provides that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, [managerial personnel] of their choice."[14] As a wholly-owned subsidiary of a Japanese corporation, Itoh-America claimed that this provision insulated it from federal review of its employment practices.[15] Plaintiffs, however, argued that if such an absolute right existed at all, it extended only to the hiring practices of the Japanese corporation and not to those of its U.S. subsidiary.[16]

The court did not address whether foreign corporations under the Treaty do in fact enjoy any exemption from U.S. employment discrimination laws. Instead, the court concluded that Itoh-America was a U.S. corporation for article VIII(1) purposes and, consequently, was not entitled to invoke such a right even if it did exist.[17] The court based this conclusion on article XXII(3) of the Treaty's definitional section, which provides that "[c]ompanies constituted under the applicable laws and regulations within the territories of either party *shall be deemed companies thereof*."[18] Because Itoh-America was incorporated under the laws of New York, it was a U.S. corporation by treaty definition and, therefore,

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no indication that these various provisions were intended to have disparate applications, the interpretation of article VIII(1) of the Japanese Treaty should apply generally to the other treaties as well. These treaties, which contain provisions similar to those which are discussed in this note, are listed in part in 8 U.S.C.A. § 1101 historical note (1970).

[10] 469 F. Supp. at 1. For a discussion of the possible causes of action and defenses arising in regard to a company hiring only citizens of a foreign country see Schwartz, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employees*, 31 STAN. L. REV. 947 (1979).

[11] 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978).

[12] *Id.* § 1981.

[13] 469 F. Supp. at 1.

[14] Treaty, *supra* note 2, art. VIII, para. 1.

[15] *Id.* at 2. Itoh-America supported this proposition by pointing to article I, which authorizes Japanese corporations to organize branches, affiliates, and subsidiaries, and article VII which authorizes and facilitates the entry of Japanese nationals into the United States to carry on trade or direct operations of a Japanese investment. According to Itoh-America, these articles, in connection with article VIII(1), accorded Japanese employers the absolute right to hire Japanese managerial personnel of their choice to staff their locally incorporated subsidiaries. *Id.* at 3.

[16] *Id.* Plaintiffs further contended that the purpose of article VIII(1) was "to prevent the imposition of ultranationalistic policies with respect to employment and not [to] shield them." Consequently, the court should look to United Nations Charter provisions "which supersede conflicting treaty provisions and state that all members pledge themselves to promote freedom for all without distinction of race." *Id.* Although the *Spiess* court did not find it necessary to reach this issue, it seems doubtful that plaintiffs would prevail on these grounds. Such provisions of the U.N. Charter are usually considered general standards or goals, rather than specific mandates, and courts are reluctant to adjudicate areas involving sensitive ideological and political goals in the absence of a legislative mandate. United States v. Vargas, 370 F. Supp. 908, 915 (D.P.R. 1974); *see also* Camacho v. Rogers, 199 F. Supp. 155 (S.D.N.Y. 1961).

[17] 469 F. Supp. at 3.

[18] Treaty, *supra* note 2, art. XXII, para. 3 (emphasis added).

was subject to the laws of the United States.[19]

The court cited only *United States v. R.P. Oldham Co.*[20] in support of its finding that Itoh-America was a U.S. corporation. In *Oldham* a wholly owned U.S. subsidiary of a Japanese corporation was indicted for antitrust violations.[21] As a defense, the subsidiary argued that article XVIII[22] of the Treaty denied the federal court jurisdiction by providing the exclusive remedy for such violations.[23] The U.S. District Court for the Northern District of California rejected this defense basing its ruling on the definitional terms of article XVIII(3).[24] The court determined that "by the terms of the Treaty itself . . . a corporation organized under the laws of a given jurisdiction, is a creature of that jurisdiction, with no greater rights, privileges, or immunities than any other corporation of that jurisdiction."[25] Thus, any protection the Treaty might afford against the application of U.S. laws would extend only to Japanese corporations, and not to their U.S. subsidiaries. The *Oldham* court noted that the subsidiary could have retained its status as a Japanese corporation by operating through a branch; instead, the company had chosen to surrender its Japanese identity to gain the privileges accorded U.S. corporations.[26]

Despite the conclusion in *Oldham* that nationality is determined by the place of incorporation, Itoh-America contended that it retained its Japanese identity by virtue of Department of State immigration guidelines and regulations.[27] These regulations,[28] adopted in connection with article I[29] of the Treaty, authorize an alien employee of a company having the nationality of a treaty country to enter the United States under "treaty trader" status. For these purposes, the nationality of the employing firm is determined by the nationality of the majority of stockholders.[30] Because Itoh-America is wholly owned by Japanese interests, it is a Japanese corporation for admissions purposes under article I. Therefore Itoh-America urged that it should be considered a Japanese corporation

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19 469 F. Supp. at 4.

20 152 F. Supp. 818 (N.D. Cal. 1957).

21 *Id.*

22 Treaty, *supra* note 2, art. XVIII, para. 1. Article XVIII states:

> The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other party to consult with respect to measures as it deems appropriate with a view to eliminating such harmful effects.

23 152 F. Supp. at 822.

24 *Id.* at 823.

25 *Id.*

26 *Id.*

27 469 F. Supp. at 5-6.

28 22 C.F.R. § 41.40 (1980).

29 *See* note 2 *supra*.

30 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL PART II, *quoted in part in* 469 F. Supp. at 6.

for purposes of article VIII(1) as well.[31] According to Itoh-America, the freedom of choice provision should be interpreted as interacting with article I so as to permit U.S. subsidiaries of Japanese corporations to fill their managerial positions with Japanese nationals of their choice, to be admitted to this country under treaty trader status. The court, however, while recognizing "that nationality is determined by a different standard for other purposes," concluded that resort to the treaty trader regulations was "unwarranted in the face of the clear definitional provisions of article XXII(3)."[32]

Once persuaded that a domestic subsidiary is not a company of Japan for article VIII(1) purposes, and, consequently, enjoys no direct protection under that provision, the *Spiess* court focused on whether the subsidiary nonetheless has standing to assert the article VIII(1) rights of its foreign parent.[33] In support of this argument, Itoh-America cited *Calnetics Corporation v. Volkswagen of America, Inc.*[34] In *Calnetics*, the Ninth Circuit permitted a U.S. subsidiary of a German corporation to challenge the lower court's imposition of an import ban on the grounds that the ban adversely affected the treaty rights of its foreign parent.[35] Itoh-America argued that *Calnetics* supported the proposition that a subsidiary incorporated in the United States enjoys the same rights as its foreign parent.[36] The *Spiess* court rejected this interpretation and, instead, found that *Calnetics* asserted that a subsidiary has standing to raise a foreign parent's treaty rights only for the foreign parent.[37] Any discussion of standing in *Spiess* would be moot, as the hiring practice of Itoh-America, not that of its parent corporation, was in issue.[38]

The *Spiess* court reasoned that a treaty interpretation which gave Itoh-America the same rights as its foreign parent would be inconsistent with the overall purpose of the Treaty to encourage mutually beneficial trade and investment by guaranteeing national treatment to foreign businesses.[39] Indeed, the Treaty generally assures nationals and companies of each country the same legal rights and duties as the nationals and companies of their host nation enjoy. The *Spiess* court found that the "tenor of the entire Treaty" was to extend equal rather than better treatment.[40] The court reasoned that while Itoh-America, as a domestic subsidiary, "cannot claim whatever benefit article VIII(1) was designed to

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[31] 469 F. Supp. at 6.

[32] *Id.*

[33] *Id.* at 7.

[34] 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

[35] *Id.* at 693.

[36] 469 F. Supp. at 8.

[37] *Id.* at 9.

[38] *Id.*

[39] *Id.* at 6. The Treaty's preface states that the purpose of the Treaty is to promote "mutually beneficial investments by establishing mutual rights and privileges . . . based in general upon principles of national and most-favored nation treatment." Treaty, *supra* note 2, preface.

[40] 469 F. Supp. at 7 (quoting United States v. R.P. Oldham Co., 152 F. Supp. at 823).

convey, it can claim the most important right conveyed by the Treaty—the right to be treated as favorably as American corporations in this country."[41]

It should be noted that in a limited number of areas the Treaty clearly accords less than national treatment. For example, article VII(3) of the Treaty permits each party to prescribe "special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair" the general right of these enterprises to engage in business.[42] Another provision, article VII(2), gives the parties the right to limit the extent of alien interests in specific sensitive enterprises such as public utilities, banking, and shipbuilding.[43] The issue left unanswered by *Spiess*, however, is whether in a further limited respect the Treaty grants better than national treatment[44]—that is, whether article VIII(1) provides foreign corporations the right to hire managerial personnel without regard to the host nation's employment laws. By concluding that Itoh-America neither enjoyed direct protection under article VIII(1) nor had any standing to invoke whateyer rights its foreign parent enjoyed, the *Spiess* court avoided this critical question.

Shortly after *Spiess*, the U.S. District Court for the Southern District of New York, in *Avigliano v. Sumitomo Shoji America, Inc.*,[45] considered the identical question of whether the Treaty provides foreign subsidiaries incorporated in the United States with an absolute right to hire managerial personnel of their choice. Relying extensively on *Spiess*, the *Avigliano* court found that no such right exists.[46] Except for a discussion concerning the treaty trader guidelines and brief references to the lack of pertinent legislative history, the *Avigliano* court, like the court in *Spiess*, seldom looked beyond the terms of the Treaty to support its interpretations. On reargument,[47] however, the *Avigliano* court was asked to reexamine the terms of the Treaty in light of several State Department

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[41] *Id.* at 6.

[42] Treaty, *supra* note 2, art. VII, para. 3. According to Herman Walker, Jr., a principal formulator of these treaties, however, the provision was less a prohibitive restriction than a circumvention of "legislation technically at variance with the principle in respect of such materially inconsequential matters as citizenship requirements for the signers of the articles of incorporation or for certain members of the board of directors." Walker, *Provisions of Companies in U.S. Commercial Treaties*, 50 AM. J. INT'L. L. 373, 387 (1956).

[43] Treaty, *supra* note 2, art. VII, para. 2.

[44] According to negotiator Herman Walker, the standard of national treatment "is set forth in general terms so as to comprehend the whole range of factors affecting the competitive position of the foreign company in relation to the domestic company. But separate provisions deal with special subjects of taxation, of employment of personnel and of real property. . . . In the matter of employment, provisions have been developed technically going beyond national treatment, to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel." Walker, *supra* note 42, at 385-86.

[45] 473 F. Supp. 506 (S.D.N.Y. 1979).

[46] *Id.*

[47] Avigliano v. Sumitomo Shoji America, Inc., 21 Fair Empl. Prac. Cas. 580 (S.D.N.Y. 1979), *aff'g*, 473 F. Supp. 506 (S.D.N.Y. 1979).

documents.[48] It is for this examination that *Avigliano* is most noteworthy.

The documents released by the State Department consisted of the negotiating record of the Treaty,[49] a recent memorandum examining the meaning of article XXII(3),[50] and contemporaneous statements by negotiators of this and similar treaties.[51] In sum, these documents support the proposition that article XXII(3) was intended by the negotiators as simply a procedural test for establishing the legal status and nationality of a company, rather than one affecting application of the Treaty's substantive rights.[52] The documents argue that the only purpose of "the place of incorporation" definition is to "avoid such complex questions as the law to be applied" in determining whether or not to recognize an organization as having company status.[53] Under this interpretation, although a Japanese-owned domestic subsidary receives its juridical status in the United States via article XXII(3), it is still considered an investment by a Japanese company for purposes of the Treaty's substantive rights.[54]

The documents also suggest a more significant role within the scheme of the Treaty for the treaty trader regulations. One U.S. negotiator stated in a dispatch that Japanese employees with treaty trader status were not free to resign from Japanese firms to seek employment elsewhere in the United States.[55] It was possible, however, for an employee "to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm."[56] The Japanese-owned subsidiary in *Avigliano* argued that this language demonstrated that the negotiators did not intend to distinguish between branches and subsidiaries as to the employment of treaty

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[48] *Id.* at 581-85.

[49] Dispatch from Jules Bassin, Legal Attache to American Embassy in Tokyo, to Mikizo Nagai, Chief, Sixth Section, Economic Affairs Bureau, Memorandum of Conversation from the Office of the United States Postal Advisor for Japan, Tokyo, Dispatch No. 13 (April 8, 1952), *quoted in* Avigliano v. Sumitomo Shoji America, Inc., 21 Fair Empl. Prac. Cas. at 582-85 [hereinafter cited as Dispatch No. 13].

[50] Department of State Airgram to the American Embassy in Tokyo, signed "Kissinger" (Jan. 9, 1976), *reprinted in* Avigliano v. Sumitomo Shoji America, Inc., 21 Fair Empl. Prac. Cas. at 582 [hereinafter cited as Kissinger Airgram].

[51] Department of State Instruction No. A-852 to HICOG, Bonn (January 21, 1954), *quoted in* Avigliano v. Sumitomo Shoji America, Inc., 21 Fair Empl. Prac. Cas. at 583 [hereinafter cited as Instruction No. A-852]; Foreign Service Dispatch No. 2529 from HICOG, Bonn, to Department of State (March 18, 1954), *quoted in* Avigliano v. Sumitomo Shoji America, Inc., 21 Fair Empl. Prac. Cas. at 583.

[52] 21 Fair Empl. Prac. Cas. at 583.

[53] *Id.*

[54] *Id.* This interpretation is consistent with another of Mr. Walker's articles in which he states:

> Normally and classically, a country extends diplomatic protection abroad for objects which are, and because they are, juridically identified with it. . . . Here, however, treaty protection is gained for entities not so identified; the "corporate veil is pierced" for the purpose of making economic interest, rather than legal relationship, the justification and the basis for protection.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 233 (1956).

[55] Dispatch No. 13, *supra* note 49, at 4, *quoted in* 21 Fair Empl. Prac. Cas. at 583.

[56] *Id.*

trader employees under the Treaty.[57] Indeed, another negotiator to a similar commercial treaty[58] stated:

> There is no intent to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. . . . The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: . . . (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual . . . is duly qualified for status as a treaty trader.[59]

This evidence clearly raises questions about the *Spiess* court's interpretation of article XXII(3).

In addition to these documents, the *Avigliano* court was also asked to consider the contrary view of the State Department as expressed in an opinion letter to the Equal Employment Opportunity Commission.[60] In an earlier view, which had been considered and rejected in both *Spiess*[61] and *Avigliano*,[62] the State Department had expressed the opinion that there were no grounds for distinguishing between the branches of a foreign parent and its domestic subsidiaries.[63] Now, reversing its earlier position, the State Department argued that "after an extensive review of the negotiating files [it had] established that the U.S. subsidiaries of Jap-

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[57] 21 Fair Empl. Prac. Cas. at 583.

[58] Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593.

[59] Instruction No. A-852, *supra* note 51, at 1, *quoted in* 21 Fair Empl. Prac. Cas. at 583.

[60] Letter from James R. Atwood, Department of State Deputy Legal Advisor to Lutz Alexander Prager, EEOC Assistant General Counsel (Sept. 11, 1979), *reprinted in* Avigliano v. Sumitomo Shoji America, Inc., 21 Fair Empl. Prac. Cas. at 581 [hereinafter cited as Atwood Letter].

[61] 469 F. Supp. at 10-11.

[62] 473 F. Supp. at 510-11.

[63] *Id.* at 511. The State Department expressed this view in response to questions posed to it by the EEOC, which submitted an amicus curiae brief in opposition to Sumitomo's motion to dismiss. In response to the question, "[D]oes the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its management positions with Japanese nationals admitted as treaty traders?" the State Department stated:

> The phrase "of their choice" should be interpreted to give effect to [the intention that the United States companies operating in Japan could hire United States personnel for critical positions, and vice versa], and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders.

To the question, "[I]s the situation different if the company doing business in the United States is not incorporated in the United States?" the State Department replied:

> [W]e see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reasons for making the applicability of Article VIII dependent on a choice of organizational form.

Letter from Lee P. Marks, Deputy Legal Advisor, Department of State, to Abner W. Sibal, General Counsel EEOC (Oct. 17, 1978), *quoted in* Avigliano v. Sumitomo Shoji America, Inc., 473 F. Supp. at 511.

anese corporations cannot avail themselves of [article VIII(1)]."[64] Instead, their rights "are determined by the general provisions . . . which provide for national [treatment]."[65]

Before considering either the State Department documents or the agency's own interpretation of article VIII(1), the *Avigliano* court recognized several well-established principles of legal construction. The Supreme Court has ruled that while courts interpret treaties for themselves, "the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."[66] Yet, courts are "not required to abdicate what is basically a judicial function and must give all parts of a treaty . . . a reasonable construction, with a view to giving a fair operation to the whole."[67] In applying these principles, the *Avigliano* court concluded that the State Department letter was of little aid because it offered no authority or reasoning in support of its position.[68] This was the same criticism which led the *Spiess* and *Avigliano* courts to reject the view of the first opinion letter;[69] yet, the State Department again failed to support its position.[70] The court undoubtedly questioned the source of the Department's reasoning because "[t]he documents raise[d] doubt about the intent of the negotiators on the narrow question before the court."[71]

Therefore, despite the new documentary evidence presented to it, the *Avigliano* court affirmed its earlier decision by resorting to a "plain term reading" of the Treaty.[72] The court noted that in articles VI(4) and VII(1) and (4), the drafters extended national treatment to "enterprises in which nationals and companies . . . have a substantial interest," while in the critical article VIII(1), rights were granted only to "nationals and companies."[73] This language demonstrated that the "drafters knew how to give locally incorporated subsidiaries rights under specific articles."[74] Thus, the court reasoned that the drafters intention-

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64 Atwood Letter, *supra* note 60, *reprinted in* 21 Fair Empl. Prac. Cas. at 581.

65 *Id.* The plaintiff and the EEOC also referred "to other Department of State documents for the proposition that the Treaty negotiators did not seek to give foreign companies greater rights than those accorded domestic companies, but rather to ensure national treatment by barring employment discrimination against aliens." 21 Fair Empl. Prac. Cas. at 583. *E.g.*, Foreign Service Dispatch No. 2529 from HICOG, Bonn, to Department of State (March 18, 1954), *cited in id.*

66 Kolovrat v. Oregon, 366 U.S. 187, 194 (1960).

67 Kelley v. Societe Anonyme Belge D'Exploitation, 242 F. Supp. 129, 136 (E.D.N.Y. 1965).

68 21 Fair Empl. Prac. Cas. at 584.

69 *See* 469 F. Supp. at 11; 473 F. Supp. at 511-12.

70 The State Department clearly was aware of both of these holdings and even referred to them in the opinion letter. *See* Atwood Letter, *supra* note 60, *reprinted in* 21 Fair Empl. Prac. Cas. at 581.

71 21 Fair Empl. Prac. Cas. at 584.

72 *Id.* at 585.

73 *Id.*

74 *Id.*

ally omitted subsidiaries from article VIII(1).[75] Consequently, the court looked to the article XXII(3) definitional provision to define "nationals and companies" and thereby excluded locally incorporated subsidiaries.[76] The *Avigliano* court concluded that the ambiguity and doubt raised by the documents could not escape this plain-term meaning.[77]

The *Spiess* court pursued a similar line of "plain term" reasoning in relying on article VI(3) and section 2 of the Protocol to support its holding against Itoh-America.[78] Article VI(3) provides compensation to "nationals and companies" when their property is expropriated for a public purpose.[79] According to the article XXII(3) definition, this protection would not extend to a subsidiary like Itoh-America because it is a company of the United States. In what the court termed an "obvious attempt to extend this protection to such entities," section 2 of the Protocol was adopted to extend compensation to "interests held directly or indirectly by nationals and companies."[80] The court reasoned that "[i]f indirect interests, e.g., subsidiaries like Itoh-America, were considered foreign corporations for [Treaty purposes], the addition of § 2 of the Protocol would have been redundant."[81]

Both of these "plain term" readings of the Treaty necessarily assume that by "enterprises in which nationals and companies have a substantial interest"[82] and by "interests held directly or indirectly,"[83] drafters were referring to locally incorporated subsidiaries, such as Itoh-America. Herman Walker, Jr., a principal formulator of these treaties, disputes this interpretation. According to Mr. Walker, the drafters instead were attempting to assure that nationals and companies of a party-nation who held interests in a company of a third nationality enjoyed the substantive rights of national treatment and compensation.[84] Thus, for example, a Japanese company with interests in a foreign corporation of a third nationality which operates in this country would be guaranteed the right to compensation for whatever of its "fractional or intermediary" interests were expropriated by the United States.[85] If Mr. Walker's interpretation is correct, then the "plain term" logic of *Spiess* and *Avigliano* is clearly in error.

The *Spiess* court's holding that a domestic subsidiary does not have standing to assert the article VIII(1) rights of its foreign parent in its own defense might also be subject to challenge. Standing exists when "the

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75 *Id.*
76 *Id.*
77 *Id.*
78 469 F. Supp. at 7.
79 Treaty, *supra* note 2, art. VI, para. 3.
80 *Id.* Protocol.
81 469 F. Supp. at 2.
82 Treaty, *supra* note 2, art. VI, para. 4.
83 *Id.* Protocol, para. 2.
84 Walker, *supra* note 42, at 388-89.
85 *Id.*

plaintiff alleges that the challenged action has caused him injury," and the "interest to be protected . . . is arguably within the zone of interest to be protected or regulated by the [law] in question."[86] Itoh-America might allege that it is economically injured when prevented from hiring specialized personnel of its choice and that this right is within the zone of interest to be protected by the Treaty, and specifically by article VIII(1). Indeed, in a treaty designed to encourage foreign investment, the right of choice provision conceivably might guarantee foreign corporations the right to hire employees in whom they have the most confidence for their essential top-level positions.[87] The *Spiess* court, however, avoided such an analysis by simply concluding that the foreign parent "has no Article VIII(1) right to staff Itoh-America."[88]

An interesting analogy to the situation in *Spiess* appears in Title VII cases involving domestic parent corporations and subsidiaries. The trend in recent cases in this area has been to inquire whether the parent and subsidiary are so closely related that the parent can be treated as an "employer" for Title VII purposes and, therefore, be held liable for employment discrimination violations committed by the subsidiary.[89] A few

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[86] Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 152-53 (1970); *accord*, Siman v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979). Indeed, Itoh-America argued in *Spiess* that recent judicial authority liberalizing standing requirements had tacitly overruled the holding in *Oldham* that a foreign-owned subsidiary incorporated in the United States was a U.S. corporation and, consequently, had no standing to invoke rights which extended only to foreign corporations. 469 F. Supp. at 5.

[87] The question may well be whether Title VII can be considered one of the discriminatory burdens or harassments from which the Treaty intended to free foreign investors. If the courts determine that the Treaty provides foreign investors with no exemption from Title VII, however, U.S. investors abroad in turn would be subject to foreign laws regulating the employment of their managerial personnel, even where such laws are more prohibitive than Title VII.

Another problem which faces the courts is the lack of guidance as to the precise meaning of the article VIII(1) terms "executive personnel," "other technical experts," and "other specialists." *See* Schwartz, *supra* note 10, at 950 n.19, 953 n.33.

[88] 469 F. Supp. at 9.

[89] *See, e.g.*, Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977); EEOC v. Upjohn Corp., 445 F. Supp. 635 (N.D. Ga. 1977). This approach has also been taken in cases involving the Age Discrimination Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1978). *See, e.g.*, Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *modified* 608 F.2d 1369 (2d Cir. 1979); Brennan v. Ace Hardware Corp., 362 F. Supp. 1156 (D. Neb. 1973), *aff'd*, 495 F.2d 368 (8th Cir. 1974). Under this view, separate corporate entities can be consolidated and considered a "single employer" if the court finds (1) interrelation of operations, (2) common management, (3) common control of labor relations, and (4) common ownership or financial control. Baker v. Stuart Broadcasting Co., 560 F.2d at 392.

This view, however, is not universally followed. In Hassel v. Harmon Foods, Inc., 336 F. Supp. 432 (W.D. Tenn. 1971), *aff'd*, 454 F.2d 199 (6th Cir. 1972) (per curiam), the court refused to consider the parent corporation as the "employer" under Title VII where the subsidiary corporation could in no way be called a sham. 336 F. Supp. at 433. The *Hassel* court noted that the affairs of the two were handled separately, and that in legal contemplation, the two were separate corporations, severally liable for purposes of debts and taxes. *Id.* The district court in Armbruster v. Quinn, 23 Fair Empl. Prac. Cas. 1801 (E.D. Mich. 1980), elaborated on the *Hassel* line of cases. The *Armbruster* court found that the legislature intended the term "employer" to have its "common dictionary meaning" and to refer to the immediate company which pays the employees' salaries, owns and operates the physical plant where the employees

cases in the antitrust area have also ignored the subsidiary's separate legal existence to treat the subsidiary as the alter ego of the parent.[90] A subsidiary of a foreign parent conceivably might argue that such a rationale should be used to determine standing. Accordingly, if Itoh-America could prove sufficiently that for practical purposes it and its foreign parent corporation were one entity, it could argue that, because it would be subject to the same liabilities as its parent corporation, it also should have the same rights, including those granted by the Treaty.

Such an argument by Itoh-America, however, diminishes significantly in strength when viewed in light of the policy considerations behind the decision in the Title VII and antitrust cases. In the domestic Title VII cases, the parent corporation and its subsidiary were treated as the same entity in order to carry out the purpose of the Act to eliminate racial discrimination.[91] In the antitrust area, while a few courts have treated parent and subsidiary as the same entity to find liability,[92] they have refused to do so where such treatment would "save them from any obligation that law imposes on separate entities."[93] Indeed, courts are likely to treat parent corporations and their subsidiaries as the same entity only where recognizing their separate legal existence will frustrate the purposes of the particular law.[94] In the *Spiess* situation, however, recognizing Itoh-America and its foreign parent as one entity for the purpose of standing to raise the article VIII(1) rights instead would frustrate the purpose of Title VII. In defense, Itoh-America might argue that the overall purpose of the Treaty is to encourage foreign investment, and that this purpose, which is thwarted by distinguishing locally incorporated subsidiaries, outweighs the purposes furthered by Title VII in this instance.

The district court in *Linskey v. Heidelberg Eastern, Inc.*[95] actually re-

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work, and manages the people and products of which the employees have personal knowledge. *Id.* at 1803. This analysis, the court held, was similar to "piercing the corporate veil" in the law of corporations. *Id.* The *Armbruster* court concluded that even using the most important factor of the *Baker* test—centralized control of labor relations—the corporations were separate entities. *Id.* Applied to the facts in *Spiess*, the *Hassel* test might well support the conclusion by the *Spiess* court that the foreign parent "has no Article VIII(1) right to staff Itoh-America," 469 F. Supp. at 9.

[90] *E.g.*, Stotten & Co. v. Amstar Corp., 579 F.2d 13 (3d Cir. 1978) (dealing with the Clayton Act).

[91] *See, e.g.*, Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977); EEOC v. Upjohn Corp., 445 F. Supp. 635 (N.D. Ga. 1977). This approach has also been taken in cases involving the Age Discrimination Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1978), to further the purposes of that Act. *See, e.g.*, Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *modified*, 608 F.2d 1369 (2d Cir. 1979); Brennan v. Ace Hardware Corp., 362 F. Supp. 1156 (D. Neb. 1973), *aff'd*, 495 F.2d 368 (8th Cir. 1974).

[92] *E.g.*, Stotten & Co. v. Amstar Corp., 579 F.2d 13 (3d Cir. 1978) (dealing with the Clayton Act).

[93] *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968).

[94] *See, e.g.*, Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978); EEOC v. Upjohn Corp., 445 F. Supp. 635 (N.D. Ga. 1977).

[95] 470 F. Supp. 1181 (E.D.N.Y. 1979). It should be noted that *Linskey* was decided before

sorted to the Title VII "employer test" in a case facing substantially the same questions as those presented in *Spiess* and *Avigliano*.[96] Instead of using the test as a vehicle for granting an immunity, however, the U.S. District Court for the Eastern District of New York authorized its use to establish the Title VII liability of the foreign parent corporation as well as its locally incorporated subsidiary.[97] To do so, of course, the court addressed the threshold question avoided by the courts in *Spiess* and *Avigliano*: whether article VIII(1) in fact provides any immunity from Title VII to any entity in any situation.[98]

Upon reviewing the available legislative history, the *Linskey* court concluded that the purpose of the provision was to exempt certain employees of foreign companies from the admission requirements of a host country.[99] This conclusion was based primarily upon a memorandum by the New York City Bar Association submitted to a Senate subcommittee reviewing a similar commercial treaty.[100] The memorandum stated that the provision was desirable because too restrictive admission requirements impede the flow of trade.[101] The court drew further support for this conclusion from the legislative history[102] of the 1967 Thailand Treaty.[103] Because the Thailand Treaty was ratified three years after passage of Title VII, the court inferred that the absence of any discussion of a possible conflict between the Treaty provision and Title VII indicated that the provision was not intended as any kind of Title VII exemption.[104] Moreover, the court cited the specific language in the Thailand Treaty which provides that "[n]ationals and companies of either Party shall be permitted, *in accordance with applicable laws* to engage

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the reargument of *Avigliano*. Indeed, the *Avigliano* court mentions *Linskey* in a footnote, but declines to "reach the issue of the substantive scope of the Treaty's employment rights." 21 Fair Empl. Prac. Cas. at 585 n.2.

[96] Although *Linskey* involves the commercial treaty between the United States and Denmark, the issues before the court were materially the same. Plaintiff was an employee of a U.S.-incorporated subsidiary of another U.S. corporation. The latter was a subsidiary of a foreign parent corporation incorporated under the laws of Denmark. Plaintiff brought suit against all three corporations, alleging violations of Title VII and the Age Discrimination in Employment Act. The foreign parent corporation moved either to dismiss the complaint or for summary judgment on the grounds that it was not the "employer" and that the Treaty of Friendship, Commerce, and Navigation between the United States and the Kingdom of Denmark expressly exempted the foreign parent from the provisions of Title VII and ADEA. 470 F. Supp. at 1182-83.

[97] *Id.* at 1184.

[98] *Id.* at 1184-85.

[99] *Id.* at 1186.

[100] Association of the Bar of the City of New York, Committee on Foreign Law, Comments on the Treaty of Friendship, Commerce, and Navigation between the United States of America and the Republic of Haiti on March 3, 1955, and Iran, on August 15, 1955 (1956), *quoted in* Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. at 1186.

[101] *Id.*

[102] SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE COMMERCIAL TREATY WITH THAILAND, S. EXEC. REP. NO. 14, 89th Cong., 1st Sess. 1 (1967).

[103] Treaty of Amity and Economic Relations with Thailand, May 26, 1966, United States-Thailand, 23 U.S.T. 1158, T.I.A.S. No. 7378 [hereinafter cited as The Thailand Treaty].

[104] 470 F. Supp. at 1186-87.

. . . [personnel] of their choice."[105] The court reasoned that although the term "applicable laws" did not refer to Title VII, it did refer to the Nationality and Immigration Act of 1952[106] and certain State Department regulations,[107] which in conjunction allowed Thai nationals to enter the United States under the favorable "treaty trader" classification.[108] Therefore, the *Linskey* court concluded that "[w]hen read in light of the applicable law of the host country, [the right of choice provision] becomes a vehicle for granting foreign nationals 'treaty trader' status," and not an exemption to Title VII.[109] In view of the fact that over thirty commercial treaties with similar "right of choice" provisions were in force, the court declared that "a different result would provide an unjustified loophole with wide-ranging effects for the enforcement of Title VII."[110]

Article VIII(1) of the Japanese Treaty does not contain the clause "in accordance with applicable laws." The legislative history of the Japanese Treaty, however, includes a tabular comparison of all the treaties ratified up to that date.[111] This table incorporates the Danish Treaty considered in *Linskey* as capturing the meaning of article VIII(1). Thus, if *Linskey* is upheld with regard to the Danish Treaty, it would be unjustified to have reached a different result in *Spiess* with regard to the Japanese Treaty.

In resolving the questions presented by these cases, the courts should be mindful of another recognized canon of treaty interpretation. The Supreme Court has emphasized that when a treaty is in conflict with a subsequent act of Congress, every effort is made to uphold all obligations.[112] When the two cannot be harmonized, however, the later in time is to prevail.[113] This rule of construction reflects the belief that the "Constitution does not declare that the law so established shall never be altered or repealed by Congress."[114] Thus, while "the other nation may have ground for complaint . . . every person is bound to obey the law."[115] This is true even though abrogation of the Treaty will adversely

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[105] The Thailand Treaty, *supra* note 103, art. IV, para. 6 (emphasis added). This provision is the Thailand Treaty's analogue to article VIII(1) of the Japanese Treaty.

[106] 8 U.S.C. § 1101(a)(15)(E)(i) (1976).

[107] 22 C.F.R. § 41.40 (1980).

[108] 470 F. Supp. at 1187.

[109] *Id.*

[110] *Id.*

[111] *Treaties of Friendship, Commerce, and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan: Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83 Cong., 1st Sess. 6-17 (1953).

[112] *See, e.g.*, Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934).

[113] *See, e.g.*, Akins v. United States, 551 F.2d 1222 (C.C.P.A. 1977); United States v. White, 508 F.2d 453 (8th Cir. 1974); Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771 (E.D.N.Y. 1978) (Trade Act superseding "national treatment" rights of Treaties of Friendship with Taiwan and Korea).

[114] Rainey v. United States, 232 U.S. 310, 311 (1914).

[115] *Id.*

affect U.S. relations with other countries which are parties to the Treaty.

When applied to the *Spiess* facts, this general principle might suggest that while the 1953 Japanese Treaty should override any conflicts with the Civil Rights Acts of 1866[116] and 1870,[117] the Treaty still is subordinate to Title VII and the Civil Rights Act of 1964.[118] Because the rule applies only if an irreconcilable conflict exists, however, the question is still primarily one of inferring congressional intent. As the legislative history of Title VII is silent on its application to these commercial treaties, the courts' decisions are likely to depend on its resolution in balancing the policies proscribing discrimination and promoting foreign trade. As a practical matter, however, courts are not likely to rely solely on this particular canon of treaty interpretation, as the results are less than satisfying. Because some of these commercial treaties were in fact adopted after the Civil Rights Act of 1964,[119] such reliance would lead to the unjustified practice of exempting some foreign employers while not others, depending solely on the dates their respective treaties were adopted.

The final disposition of *Spiess* must be reconciled with the decisions in *Avigliano* and *Linskey*. Though all three cases ultimately hold against the foreign-owned subsidiary, the courts' interpretations of the same treaty provision are not entirely consistent. In *Spiess*, the court "in the absence of statutory ambiguity," relied upon the "clear definition" provided in the treaty.[120] The meaning of that definition is to equate nationality with place of incorporation; yet, in light of the evidence presented in *Avigliano*, the intended scope and purpose of this definition is critically in issue. Thus, in an inquiry "to give the specific words of a treaty a meaning consistent with the genuine shared expectations of the parties,"[121] the *Spiess* court was content to look no further than the expressed terms of the Treaty, although these terms are not as unambiguous as that court believed. Moreover, the court in *Spiess* avoided the inevitable threshold question of whether an immunity exists at all—a question answered in the negative by *Linskey* in a holding based largely on the silence of the legislative history of the treaties.[122]

In truth, the courts are probably being asked to infer an intent that did not exist. Accordingly, resolution of whether the commercial treaties accord foreign parent corporations or their U.S.-incorporated subsidiaries with an exemption from U.S. civil rights laws will ultimately be determined within the court's discretion. In making the decision, however, two considerations should be emphasized. First, substantial evidence

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116 42 U.S.C. § 1982 (1976).
117 *Id.* § 1981.
118 42 U.S.C. §§ 2000e to 2000d-17 (1976 & Supp. II 1978).
119 *E.g.*, The Thailand Treaty, *supra* note 103 (adopted on April 26, 1967).
120 469 F. Supp. at 7.
121 Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963).
122 *See* 470 F. Supp. at 1186.

outside of the treaty supports the proposition that the article XXII(3) definitional provision was intended by the negotiators to be only a procedural test, rather than one affecting the application of the Treaty's substantive provisions. Second, the overall purpose of the Treaty unequivocally was to extend equal treatment to foreign investors. Allowing article VIII(1) to be used to exempt foreign corporations or their U.S. subsidiaries from U.S. civil rights laws would be an extension of more-than-equal treatment that could be viewed as providing "an unjustified loophole" to avoid application of the principles of equal opportunity. Before reaching a satisfactory decision, the courts must reconcile these seemingly incongruous considerations.

The final resolution of these cases will have a profound impact both in this country and abroad. The United States is currently a party to over two dozen bilateral treaties containing similar "right of choice" provisions.[123] While the *Spiess* court addressed only the application of these provisions to U.S.-incorporated subsidiaries, the provisions inevitably will be invoked by the many foreign corporations which are not incorporated under U.S. laws, but which operate in this country under these same commercial treaties through other corporate forms such as branches or affiliates. Indeed, if *Spiess* is affirmed on this distinction between the U.S.-incorporated subsidiaries and the foreign parent, other foreign employers could easily change the corporate forms of their businesses to enjoy the article VIII(1) immunity. With foreign investment spiraling in this country,[124] a significant number of employers and potential employees would be directly affected by such an absolute immunity. By granting foreign employers an immunity against U.S. employment discrimination laws, the court would not only be encouraging foreign businesses to invest in the United States, but would also be promoting privileged treatment for American investors abroad. On the other hand, denying such an immunity would promote equality of opportunity. The final resolution of the question of the scope of treaty protection afforded foreign employers will reflect the extent of the United States' commitment to end discrimination within its borders, as well as to promote human rights abroad.[125]

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[123] *See* note 9 *supra*.

[124] Direct foreign investment in the United States increased by more than 36% within three years to reach $34.1 billion at the end of 1977. *Foreign Managers Make a Hit with U.S. Workers*, U.S. NEWS & WORLD REP., Jan. 8, 1979, at 59. Japanese spending in particular is accelerating. *Japan Steps Up its "Invasion" of U.S.*, U.S. NEWS & WORLD REP., Dec. 11, 1978, at 57.

[125] *See* Schwartz, *supra* note 10, at 975-76.